

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Applications of)	
)	
AirGate Wireless, L.L.C., Assignor, and	)	File No. 0000002035
Cricket Holdings, Inc., Assignee	)	DA 98-2319
)	
For Consent to Assign Broadband PCS F Block)	
Licenses KNLF882, KNLG279, KNLG280)	
and KNLG281)	
)	
Application of Leap Wireless International, Inc.	)	File No. 0000012974
For Authorization to Construct and Operate 36	)	DA 99-990
Broadband PCS C Block Licenses)	
)	
And)	
)	
In the Matter of)	
)	
PCS Devco, Inc.	)	File No. 0000032055
Application for Assignment of Authorization	)	Public Notice Report No. 346
For Station KNLF998)	
)	
ChaseTel Licensee Corp.	)	File No. 0000027712
Application for Assignment of Authorizations For	)	Public Notice Report No. 346
Stations KNLF459, KNLF460, KNLF461,)	
KNLF462, KNLF463, KNLF464, KNLF465,)	
KNLF466, KNLF467, KNLF468 and KNLF 469)	
)	
Leap Wireless International, Inc.	)	File No. 0000031464
Application for Assignment of Authorization	)	Public Notice Report No. 353
For Station WPOK577)	

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 2000

Released: July 27, 2000

By the Commission:

1. The Commission has before it two applications for review filed by Carolina PCS I Limited Partnership ("Carolina PCS").¹ In the application for review filed August 23, 1999, Carolina PCS

¹ See In the Matter of Applications of AirGate Wireless, L.L.C. Assignor, and Cricket Holdings, Inc., Assignee, FCC File Nos. 0000002035 and 0000012974, Application for Review of Carolina PCS I Limited Partnership, filed August 23, 1999 ("1999 Application for Review"); In the Matter of PCS Devco, Inc., ChaseTel Licensee Corp., and Leap Wireless International, Inc., FCC File Nos. 0000032055, 0000027712, and 0000031464, Application for Review, filed by Carolina PCS I Limited Partnership, March 14, 2000 ("2000 Application for Review").

requests review of a July 22, 1999 Memorandum Opinion and Order (“*Leap Order*”)² by the Commercial Wireless Division (“CWD”) of the Wireless Telecommunications Bureau.³ In the application for review filed March 14, 2000, Carolina PCS requests review of a February 14, 2000 Memorandum Opinion and Order (“*PCS Devco Order*”).⁴ For the reasons set forth below, we deny both of Carolina PCS's Applications for Review.

I. BACKGROUND

2. In the *Leap Order*, CWD conditionally granted two Leap applications: an application to assign four PCS F block licenses from AirGate Wireless, L.L.C. (“AirGate”) to Cricket Holdings, Inc. (“Cricket”), a wholly owned subsidiary of Leap, and Leap’s long-form application for 36 C block PCS licenses for which Leap was the high bidder in Auction No. 22. Specifically, CWD found Leap eligible under our rules to hold these C and F block PCS licenses, determining that Leap, together with its affiliates and persons or entities that hold interests in Leap and their affiliates, should be considered to have had gross revenues for each of the two preceding years of less than \$125 million and total assets of less than \$500 million at the time it filed its applications.⁵ CWD’s determination of Leap’s eligibility was based upon a finding that Leap met the Publicly Traded Corporation Exception (“PTC Exception”),⁶ pursuant to which the gross revenues and assets of QUALCOMM Incorporated (“QUALCOMM”)⁷ are not attributable to Leap in calculating its eligibility under section 24.709(a)(1).

3. In finding Leap qualified under the PTC Exception, CWD analyzed the relationship between Leap and QUALCOMM, including several agreements entered into by Leap and QUALCOMM

² AirGate Wireless, L.L.C., Assignor, and Cricket Holdings, Inc., Assignee, and Application of Leap Wireless International, Inc. for Authorization to Construct and Operate 36 Broadband PCS C Block Licenses, *Memorandum Opinion and Order*, 14 FCC Rcd 11,827 (CWD, 1999).

³ See Carolina PCS Petition to Deny the AirGate Wireless/Cricket Holdings, Inc., Assignment Application, filed December 14, 1998, and Carolina PCS Petition to Deny Leap's Long Form Application, filed June 3, 1999.

⁴ See PCS Devco, Inc., ChaseTel Licensee Corp., and Leap Wireless International, Inc. Applications for Assignment of Authorizations, *Memorandum Opinion and Order*, DA 00-279 (AIAD, rel. Feb. 14, 2000).

⁵ See 47 C.F.R. § 24.709(a)(1) *see also Leap Order*, 14 FCC Rcd at 11,835, ¶16.

⁶ See 47 C.F.R. § 24.709(b)(2). Under section 24.720(m) of our rules, a publicly traded corporation is defined as one organized under the laws of the United States: (1) whose shares, debt, or other ownership interests are traded on an organized securities exchange within the United States; (2) in which no person (i) owns more than 15 percent of the equity, or (ii) possesses, directly or indirectly, through the ownership of voting securities, by contract or otherwise, the power to control the election of more than 15 percent of the members of the board of directors or other governing body of such publicly traded corporation; and (3) over which no person other than the management and members of the board of directors or other governing body of such publicly traded corporation, in their capacities as such, has *de facto* control . . .” 47 C.F.R. § 24.720(m).

⁷ As explained in the *Leap Order*, on September 23, 1998, QUALCOMM, a large manufacturer of telecommunications equipment and infrastructure based on CDMA technology, divested its worldwide carrier operating assets by spinning off these assets to its then wholly owned subsidiary, Leap (Spin-Off Transaction). To effect this separation, QUALCOMM transferred business assets, cash and payment rights to Leap. See *Leap Order*, 14 FCC Rcd at 11,829, ¶ 4.

pursuant to the Spin-Off Transaction. CWD concluded that no party, including QUALCOMM, holds more than 15 percent of Leap's equity, finding that "based on the structure created by the Warrant and the Agreement Concerning Share Ownership, we find that the maximum number of shares that QUALCOMM may hold under the Warrant will not exceed 15 percent of Leap's equity."⁸ CWD also found that Leap's shares are publicly traded on the Nasdaq National Market,⁹ that QUALCOMM cannot control the election of more than 15 percent of Leap's board of directors,¹⁰ and that QUALCOMM does not exercise either direct or indirect control over Leap.¹¹ In granting the applications, CWD imposed several conditions to "eliminate any concerns that there has not been a 'clear fracture' between Leap and QUALCOMM . . ."¹² Further, after finding Leap qualified under the PTC Exception, CWD concluded that QUALCOMM also should not be considered an affiliate of Leap for purposes of determining Leap's eligibility to hold C and F block PCS licenses.¹³

4. In the *PCS Devco Order*, the Auctions and Industry Analysis Division ("AIAD") granted three applications: an application to assign 11 PCS C block licenses from ChaseTel Licensee Corporation (ChaseTel) to Leap; an application to assign one PCS F block license from PCS Devco to Cricket; and an application to assign one PCS C block license from Leap to PCS Devco. Specifically, AIAD granted the applications for Leap to acquire licenses from ChaseTel and for Cricket to acquire a license from PCS Devco, subject to the same conditions that were imposed in the *Leap Order*.¹⁴ AIAD also granted the application for Leap to assign one license to PCS Devco.¹⁵ AIAD stated that it viewed the *Leap Order* as dispositive of the issues that Carolina PCS raised against the ChaseTel and PCS Devco assignments to Leap or Cricket and the assignment application from Leap to PCS Devco.¹⁶ Further, AIAD stated that "[a]ny assignment is subject to the outcome of pending proceedings challenging the underlying eligibility of the assignor to hold the assigning license."¹⁷

II. DISCUSSION

A. Application for Review of the *Leap Order*

5. Carolina PCS argues that CWD's finding that Leap is eligible to hold C and F block PCS licenses granted in the *Leap Order* should be reversed because QUALCOMM is an affiliate of Leap, and

⁸ *Id.* at 11837, ¶ 21.

⁹ *Id.* at 11,836, ¶ 18.

¹⁰ *See id.* at 11,839, ¶ 25.

¹¹ *See id.* at 11,840-42, ¶¶ 26-29.

¹² *See id.* at 11,841, ¶ 28.

¹³ *See id.* at 11,842-44, ¶¶ 30-34.

¹⁴ *PCS Devco Order*, DA 00-279, at ¶ 4.

¹⁵ *Id.* at ¶ 6.

¹⁶ *Id.* at ¶ 4.

¹⁷ *Id.* at ¶ 6.

therefore QUALCOMM's revenues and assets are attributable to Leap. Carolina PCS, however, presents no arguments in its 1999 Application for Review that would lead us to change CWD's decision. We therefore affirm that decision for the reasons stated therein.¹⁸ The *Leap Order*, however, did not address the issue Carolina PCS raises as to whether QUALCOMM should be considered Leap's predecessor-in-interest pursuant to section 24.720(f) of the Commission's rules.¹⁹ Accordingly, we address this issue below.

6. Carolina PCS argues that notwithstanding the PTC Exception, Leap still exceeds the assets and revenues requirements of our rules for designated entities because the gross revenues and total assets of QUALCOMM must be attributed to Leap as Leap's predecessor-in-interest.²⁰ In defining gross revenues, section 24.720(f) states, in part, that for purposes of evidencing such gross revenues, "if an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest."²¹ Carolina PCS interprets this rule to mean that because Leap did not exist as a separate entity until September 1998, QUALCOMM must be viewed as Leap's predecessor-in-interest, and QUALCOMM's assets and revenues must be attributed to Leap for the two-year period prior to that time in determining Leap's eligibility as a very small business. Such attribution would cause Leap to exceed the assets and revenues limits set forth in section 24.709.²²

7. We find that QUALCOMM is not Leap's predecessor-in-interest as that term is used in section 24.720(f). For purposes of section 24.720(f), we find that a predecessor-in-interest is a predecessor entity of the applicant that controls or has the power to control the applicant, or that the applicant controls or has the power to control. By requiring an applicant to include assets and revenues of its predecessor-in-interest, the Commission's intent was to ensure that an entity is unable to evade the limits on assets and revenues by, for example, changing its name or establishing a shell corporation while continuing to control the new entity. The Commission has emphasized that it "will not tolerate 'fronts' that are controlled by supposedly passive investors, and we will be vigilant in preventing abuse of the designated entity provisions."²³ The Commission did not, however, intend to include assets and revenues of an entity that has fully relinquished control of the applicant.

8. In this case, QUALCOMM is not Leap's predecessor-in-interest because QUALCOMM

¹⁸ We note that, in another proceeding, Nextel Communications, Inc. has raised issues related to Leap's candor before the Commission. *See* In the Matter of Applications of Beta Communications, L.L.C. (File Nos. 0000110639, 0000110695, Comments on or, in the Alternative, Petition to Deny of Nextel Communications, Inc., filed May 26, 2000. We take no position on that proceeding.

¹⁹ 47 C.F.R. § 24.720(f).

²⁰ 1999 Application for Review at 8. This argument was raised by Carolina PCS in a footnote to its May 24, 1999 Letter to the Commission, and its Petition to Deny Leap's Long Form Application, filed June 3, 1999. To qualify as a "very small business," an applicant must demonstrate that it, together with its affiliates or entities that hold interests in the applicant and their affiliates, have average gross revenues that are not more than \$15 million for the preceding three years. 47 C.F.R. § 24.720(b)(2).

²¹ 47 C.F.R. § 24.720(f).

²² 1999 Application for Review at 8-9.

²³ In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, 5540 ¶ 20 (1994).

does not control and is not affiliated with Leap for purposes of the PTC Exception. If we were to attribute QUALCOMM's revenues and assets to Leap as its predecessor-in-interest, as Carolina PCS argues, it would mean attributing to Leap the revenues and assets of QUALCOMM to Leap from before the Spin-Off Transaction, when Leap was completely part of and dependent upon QUALCOMM and ignoring the fact that QUALCOMM has divested control of Leap. We agree with the Division's finding that, following the spin-off, there was a clear fracture between Leap and QUALCOMM and that, therefore, QUALCOMM does not exercise *de facto* control over Leap and is not affiliated with Leap. Therefore, we deny Carolina PCS's 1999 Application for Review.

B. Application for Review of the *PCS Devco Order*

10. Carolina PCS argues that AIAD did not properly condition its grant in the *PCS Devco Order* on the outcome of the appeal of the *Leap Order*, that Leap should not have been able to establish its qualifications to acquire additional DE licenses, and that AIAD also could not rely on the *Leap Order* in acting on the applications before it.²⁴ We disagree with Carolina PCS on all accounts. First, as Carolina PCS notes in its Application for Review, the *PCS Devco Order* states that the resolution of the issues addressed in the *Leap Order* ultimately controls the outcome of the applications that are the subject of the *PCS Devco Order*. Specifically, AIAD stated, “[w]e view that order to be dispositive of the issues raised here by Carolina PCS.”²⁵ We believe that AIAD appropriately recognized that, if the appeal of the *Leap Order* were successful, and Leap were found to be unqualified to hold DE licenses, Leap would also not be qualified to hold the licenses granted in the *PCS Devco Order*. We do not believe that AIAD was obligated to make a more formal statement of the relationship between the Orders.

11. Second, we believe that Leap was entitled to rely on the *Leap Order* to establish its qualifications to acquire additional licenses because the *Leap Order* was effective on the day it was released, and no action had been taken to stay its effectiveness. Section 1.102 of our rules states that “[n]on-hearing or interlocutory actions taken pursuant to delegated authority shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of such action”²⁶ While the rule also permits the Commission to stay the effectiveness of such actions if an application for review is filed,²⁷ no such stay was imposed here. Pursuant to Section 1.102 of our rules, CWD's decision was effective on the day it was released, and Leap was entitled to rely on it until such time as CWD's conclusions might be overturned on review. Therefore, we deny Carolina PCS's 2000 Application for Review.

12. Accordingly, IT IS ORDERED that pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the

²⁴ 2000 Application for Review at 2, 3, 5.

²⁵ *PCS Devco Order*, DA 00-279, ¶ 4.

²⁶ 47 C.F.R. § 1.102(b)(1).

²⁷ See 47 C.F.R. § 1.102(b)(3).

Application for Review filed by Carolina PCS I Limited Partnership on August 23, 1999 and the Application for Review filed by Carolina PCS I Limited Partnership on March 14, 2000 ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary